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December 2, 2011

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BY E-FILE

ENTERED
Office of Proceedings

FILED
Ms. Cynthia Brown
Chief Administration, Office of Proceedings
Surface Transportation Board
395 E Street, N.W.
Washington, D.C. 20423

DEC 05 2011

Part of
Public Record

RE: FD 35559, Saratoga And North Creek Railway, LLC-Operation Exemption-
Tahawus Line

Dear Ms. Brown:

On behalf of Saratoga And North Creek Railway, LLC, I am filing an appeal
of the Acting Director's decision dated November 23, 2011, rejecting its Notice of
Exemption filed in the above-captioned proceeding.

ORIGINAL

Sincerely yours


John Heffner

FILED

DEC 5 2011

**SURFACE
TRANSPORTATION BOARD**

JDH:jg

ORIGINAL
Cc: Members of the Surface Transportation Board

John W. Caffry, Esq.

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**SURFACE
TRANSPORTATION BOARD**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35559

**SARATOGA AND NORTH CREEK RAILWAY, LLC
—OPERATION EXEMPTION—
TAHAWUS LINE**

**VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 U.S.C. 10902 and 49 CFR 1150.41**

APPEAL OF ACTING DIRECTOR'S DECISION

Submitted By:

John D. Iieffner
Strasburger & Price, LLP
1700 K Street, N.W.
Suite 640
Washington, D.C. 20006
(202) 742-8607

Counsel for Petitioner

Dated: December 2, 2011

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35559

**SARATOGA AND NORTH CREEK RAILWAY, LLC
—OPERATION EXEMPTION—
TAHAWUS LINE**

APPEAL OF ACTING DIRECTOR'S DECISION

INTRODUCTION

Pursuant to 49 CFR 1011.2(a)(7) and 49 CFR 1115.1(c), Saratoga and North Creek Railway, LLC (“Saratoga”) files this appeal of a decision issued on November 23, 2011,¹ by the Acting Director of the Office of Proceedings under her delegated authority. That decision rejected as “controversial” a notice of exemption (“NOE”) Saratoga had previously filed in the above-captioned proceeding to operate as a common carrier over a 29.71 mile-long spur track.² A copy of that NOE is submitted here as Exhibit A. Rejection was based on a single

¹ Hereafter cited as the November 23 Decision and attached here as Exhibit B.

² Identified here as the Tahawus Line.

letter protest filed by Protect the Adirondacks! Inc., a New York not-for-profit conservation group (“Protect”).³ Saratoga appeals this decision because it reflects a clear error of judgment on the Acting Director’s part inasmuch as Protect did not request or cite a legal basis for either rejection or revocation of the exemption, and did not bear its burden of proof. Moreover, the November 23 Decision did not address the Board’s standards for rejection or revocation, was contrary to agency precedent, and cited as facts information contrary to the evidence of record.

BACKGROUND

As the Board will recall, Saratoga is a Board authorized class III short line railroad which has instituted operations over two contiguous segments of railroad between Saratoga Springs and North Creek, NY, pursuant to two exemptions issued by the Board on June 1, 2011.⁴ On October 25, 2011, it filed the subject NOE to extend its common carrier operations over the Tahawus Line.⁵ Of course, Saratoga could chose to operate the Tahawus Line as an extended spur just as the

³ A copy is attached as Exhibit C.

⁴ See Saratoga & N. Creek Ry.—Acquis. & Operation Exemption—Del. & Hudson Ry., FD 35500 (STB served June 1, 2011) and Saratoga & N. Creek Ry., LLC—Operation Exemption—Warren Cnty., N.Y., FD 35500 (Sub-No. 1) (STB served June 1, 2011). These decisions will be cited collectively as the “June 2011 exemptions.”

⁵ NL Industries, Inc. (“NL”) sold the subject segment of railroad to Saratoga on November 4, 2011. No Board authority was required for Saratoga to acquire this private segment of railroad. B. Willis, C.P.A., Inc.—Petition for Declaratory Order, FD 34013, STB served Oct. 3, 2001), *aff’d sub nom.*, B. Willis, C.P.A., Inc. v. STB, 51 Fed Appx. 321 (D.C. Cir. 2002).

Delaware & Hudson Railway did for many years before terminating service. But instead it voluntarily filed the NOE because it wants to “hold out” to serve any and all shippers.

Saratoga’s actions to acquire and operate a continuous line of railroad from Saratoga Springs all the way to the northerly terminus of the Tahawus Line at Newcomb have enjoyed substantial public agency support in New York State. The Town of Corinth chose Saratoga as the operator for the segment it owns after going through a thorough request-for-proposal process. Similarly, Warren County selected Saratoga to operate that segment. Moreover, the New York State Department of Transportation granted an exemption from section 18 of the New York State Transportation Law, allowing Saratoga to acquire the right-of-way without having to comply with the State’s right of first refusal process. Saratoga’s acquisition and operation also has the support of the Essex County Industrial Development Agency, which previously waived its right of first refusal to acquire the Tahawus Line in favor of the conveyance to Saratoga.⁶

The Acting Director’s rejection relied solely on a seven page letter protest filed with the Board on November 14, 2011, to which Saratoga replied on November 22. *See* November 23 Decision, page 3, note 3. Purporting to be

⁶ *See* the June 2011 exemptions.

interested in conservation, Protect challenged Saratoga's NOE for omitting what it asserted was important information. Although the protest did not appear to seek any specific relief other than a "careful review" and did not seek to stay, reject, or revoke the NOE, the Acting Director took it upon herself to treat the Protest as a petition to reject.⁷

ARGUMENT

Section 1011.2 of the Board's Rules of Practice, provides that the Board reserves to itself all appeals of initial decisions issued by the Director of the Office of Proceedings under his or her designated authority. Section 1115.1(c) of those rules adds that appeals from decisions of employees acting under delegated authority will be acted upon by the entire Board. Although not favored, the rules provide that appeals will be granted in "exceptional circumstances" to correct a clear error of judgment or to prevent manifest injustice. Cf. Indiana Southwestern Railway Co., - Abandonment Exemption – In Posey and Vanderburgh Counties, Ind., Docket No. AB 1065X, STB served April 8, 2011 (granting an appeal from and reversing a director decision initially finding an OFA offeror "financially

⁷ Paragraph three at the first page of the November 23 Decision states that "[o]n November 14, 2011, Protect the Adirondacks! Inc. (Protect), a non-profit organization, filed a petition to reject Saratoga's notice of exemption." The decision then goes on to state in a footnote that the "protest" will be considered a petition to reject the notice of exemption. November 23 Decision at page 1, note 1.

responsible” upon presentation of new evidence). In Chelsea Property Owners—Abandonment—Portion of the Consolidated Rail Corporation’s West 30th Street Secondary Track in New York, NY, Docket No. AB-167 (Sub-No. 1094)A, *et al.*, STB served June 13, 2005, slip op. at 5-6 (cited as “*Chelsea*”) the Board further observed that appeals of initial decisions must be based on one or more of the following grounds: (1) a necessary finding of fact is omitted, erroneous, or unsupported by substantial evidence of record; (2) a necessary legal conclusion or finding is contrary to law, Board precedent, or policy; (3) an important question of law, policy, or discretion is involved which is without governing precedent; and (4) prejudicial error has occurred.

Saratoga submits that out of a desire to issue a decision before the Thanksgiving Holiday in response to the protest, the Acting Director relied solely on Protect’s allegations and seriously misread and/or ignored information filed by Saratoga and NL Industries. Accordingly, grounds one, two, and four in *Chelsea*, above, are implicated.

Saratoga appeals the November 23 Decision for the following three reasons:

1. The November 23 Decision did not accurately reflect the evidence of record

While the November 23 Decision stated that the protest would be considered as a petition to reject, that decision did not articulate a clear basis for this ruling. Moreover, the decision reflected either an outright misreading or a misunderstanding of the facts presented. For starters, the Acting Director observed that where a party alleges that an exemption is sought for purposes *other than providing common carrier rail service*, the Board will not allow the exemption to become effective without considering that evidence and argument. November 23 Decision at page 2. After belittling the Tahawus Line's potential to handle freight for two potential on-line customers currently using trucks, the Acting Director focused on a statement that she said indicated a plan to commence passenger service in the "very near future." Id.

But the evidence furnished by both Saratoga and NL indicates no plan to provide passenger service "in the very near future" *over the trackage that is the subject of this particular exemption*. While the Acting Director cited to a statement by Saratoga witness Stephen Gregory as evidence of a plan to run passenger trains in the very near future, she misread his testimony. What Mr. Gregory said is two-fold. First, in talking about the general passenger plans of Saratoga's corporate holding company parent Iowa Pacific Holdings, LLC, Mr. Gregory stated,

“Iowa Pacific’s mission since its founding in 2001 has been to identify shortline railroads that offer significant business development potential, either freight or passenger, depending on the properties and their markets.”

Regarding Saratoga’s specific passenger operations, Mr. Gregory testified,

“[a]s we made clear in our presentations to Warren County and the Town of Corinth...our vision to develop the County’s and the Town’s rail asset was twofold: initial deployment of resources to immediately provide passenger-train service to be followed by freight traffic development.” Gregory V.S., submitted here as Exhibit D.

The “rail asset” referenced by Mr. Gregory consisted of segments extending between Saratoga Springs and Corinth and Corinth and North Creek identified in the June 2011 exemptions on page 3, note 2, *supra*,⁸ not the Tahawus Line. At no point did Mr. Gregory suggest that Saratoga planned to initiate passenger service over the Tahawus Line that is the subject of this NOE. In quoting a statement by *supporting shipper NL* that suggests Saratoga might want to run passenger service on the Tahawus Line, the Acting Director omitted NL’s parenthetical “should it be required in the future.” *Compare* November 23 Decision at page 2, note 2, with NL’s letter submitted here as Exhibit E. Obviously Saratoga is not bound by NL’s speculation about passenger service. With all due respect, the Acting Director’s statement that “Saratoga’s reply submission contains conflicting statements

⁸ With regard to segments covered by the June 2011 exemptions, passenger and freight service was specifically requested by the Town of Corinth and Warren County. There has been no request for passenger service over the Tahawus Line by local jurisdictions.

regarding its intentions for passenger excursion operations on the *Tahawus Line*” [emphasis supplied] is grossly in error. Even the protest contains nothing suggesting that Saratoga intends to start passenger service in the “very near future.” In fact, the protest contains only three references to passenger service. At page 1, Protect states without evidentiary foundation, “[a]s a common carrier, SNCR [Saratoga] intends to operate a tourist train over the entire 29.71 miles of track.” At page 5, Protect alleges that “contamination on 1200 acres of NL industrial land raises questions of passenger safety.” Then Protect adds, “[p]assengers would have to be bused from that location near the foot of the High Peaks to other places, raising questions about whether or not a marketing study has been done.” *Id.* The latter two allegations are meaningless unless Saratoga proposes passenger service over the Tahawus Line, which it does not.

As Saratoga asserted in its Reply citing Magner-O’Hara Scenic Ry. v. I.C.C.,⁹ intrastate passenger service is outside the Board’s jurisdiction. The Board as much as agreed in stating in the November 23 Decision at page 2, note 2, “[n]ot all passenger service is within the Board’s jurisdiction.” The Acting Director appears to have escalated a nonissue (passenger service) into the *raison d’etre* for rejecting Saratoga’s NOE. This result might be appropriate if Saratoga showed no

⁹ Reported at 692 F.2d 441 (6th Cir. 1982).

bona fide intention of providing common carrier service within the Board's jurisdiction but that is not the case here.

Beyond a mere recitation of submissions by both Saratoga and Protect, the Acting Director's discussion of Saratoga's proposed freight service is even more limited. Her sole statement on this matter reads as follows:

"Although Saratoga states that it has engaged in discussions with 2 shippers about potential freight rail service, both customers currently ship their products via truck." November 23 Decision at page 2.

She makes no reference to the two-page support letter provided by NL's Andrew Fleck on November 21, 2011, which rebutted numerous inaccurate statements made by Protect regarding the status, extent, and quality of the railroad right of way, the significant reserves of rock and magnetite that are currently moving by truck, and NL's completion of its environmental remediation measures.

Conspicuously absent from the November 23 Decision is any reference to NL's statement that "NL is in active negotiations with Saratoga regarding the sale and transport of this material over the rail line." Exhibit E at page 2. Furthermore, Saratoga witness Gregory noted that the railroad has approached Barton Mines about moving its traffic by rail¹⁰ and even Protect acknowledges that Barton is a major producer and shipper of industrial garnets ("Barton Mines still produces

¹⁰ See, Gregory V.S.

thousands of tons of some of the best industrial garnets in the world. Since the abandonment of the rail spur by NL in 1989, this product has been hauled out by truck”).¹¹ Protest at page 4. Just because NL and Barton Mines currently use trucks to handle their transportation needs does not mean that their transportation needs are any less important or should not be considered. *Cf.* Norfolk Southern Railway Company-Adverse Abandonment-St. Joseph County, IN, Docket No. AB-290 Sub-no. 286, STB served Feb. 14, 2008, slip op. at 4, *aff’d sub. nom. City of South Bend In v. Surface Transportation Board*, 566 F.3d 1166 (D.C. Cir. 2009)(where the Board held that traffic which formerly moved by rail and now moves by truck could be considered as evidence of public need). If Saratoga believes that there is a possibility of attracting NL’s and Barton Mines’ substantial freight business back to rail, it is for the marketplace and not the agency to second guess that managerial judgment.

The Acting Director’s sole reliance on the passenger service issue, coupled with her apparent conclusion that there is no freight traffic susceptible for

¹¹ Because the Tahawus Line was not a regulated line of railroad in 1989, it could not have been ‘abandoned’ as that term is used in the I.C.C. Termination Act or the Interstate Commerce Act. It is Saratoga’s understanding that the Delaware & Hudson Railway terminated service on the line at some point in the past.

movement by rail, shows that a necessary finding of facts is unsupported by the evidence of record and represents a clear error of judgment on her part.

In fact, there is nothing controversial about Saratoga's NOE. Saratoga does not seek to transport municipal solid waste or construction and demolition debris over the Tahawus Line. Nor does it intend to establish any sort of waste transfer facility. Saratoga is not seeking a common carrier status for the Tahawus Line to clothe itself with federal preemption so as to avoid the application of state or local laws or regulations or condemnation actions. To the best of its knowledge, no state or local agency or present or potential customer opposes Saratoga's proposal.¹² All that Saratoga seeks to accomplish here is to operate the Tahawus Line as a common carrier line of railroad so it can serve the two present on-line customers and aggressively attract new industry to the Tahawus Line. The Board has issued many decisions approving the conversion of private, industry, or spur tracks to

¹² See, e.g., Northeast Interchange Railway, LLC-Lease And Operation Exemption-Line in Croton-on-Hudson, NY, FD 34734, STB served Nov. 18, 2005 (proposed new common carrier railroad with transload facility for handling waste and construction and demolition debris heavily opposed by local community); Riverview Trenton Railroad Company, FD 33980, STB served Feb. 15, 2002 (strong local government opposition: notice revoked, not rejected); Jefferson Terminal Railroad Company - Acquisition and Operation Exemption - Crown Enterprises, Inc., FD 33950, STB served Mar. 19, 2001 (conversion of private trackage to common carrier service in part in order to claim federal preemption to avoid local condemnation proceedings).

common carrier rail service including some involving opposition.¹³ As recently as November 29, 2011, parties new to the railroad industry and existing short line railroad owners have continued to use the class exemption procedures for Board approval of new operation transactions involving heretofore private trackage. *See*, a notice of exemption filed by Swan Watch Railroad, L.L.C.,¹⁴ a new noncarrier subsidiary of short line railroad owner WATCO, to takeover operations at the Swan Industrial Park in Cheyenne, WY. There is no reason why Saratoga cannot avail itself of this procedure.

¹³ Ohio Valley Railroad Company-Acquisition And Operation Exemption-Harwood Properties, Inc., FD 34486, STB served Sept. 28, 2004 (STB allowed a noncarrier to initiate common carrier operations over trackage leased from the noncarrier owner over the objection of a connecting short line railroad which filed a petition to reject or revoke); *compare* Yolo Shortline railroad Company-Lease and Operation Exemption-Port of Sacramento, FD 34114, STB served Nov. 20, 2001 *with* Union Pacific Railroad Company-Operation Exemption-In Yolo County, FD 34252, STB served Dec. 5, 2002 (cases involving Yolo's takeover of Port-owned trackage formerly operated by Union Pacific as "exempt" private yard trackage; the parties had filed petitions to revoke and reject each others filings; the Board denied Union Pacific's petitions); and SMS Rail Service, Inc.-Petition for Declaratory Order, FD 34483, STB served January 24, 2005 (involving a challenge by Norfolk Southern Railway to common carrier operations instituted by short line railroad SMS over "exempt" private trackage at an oil refinery which SMS had previously served as a noncommon carrier switching railroad; the Board ruled in SMS's favor finding its operations those of a common carrier).

¹⁴ Docketed as FD 35574.

2. The Acting Director's summary rejection of Saratoga's NOE was contrary to agency precedent and policy

The Acting Director's out of hand rejection of Saratoga's NOE as "controversial" fails to follow agency precedent on the handling of exemption notices that were far more controversial than that involved here, and were opposed by shippers and state or local agencies instead of a single environmental group.¹⁵ The history of short line railroad acquisition and operation cases at the former Interstate Commerce Commission and at the Board is filled with cases in which the agency allowed those exemptions to take effect despite substantial and well articulated opposition filed by public body and even shipper protestants. New York & Atlantic Railway Company-Operation Exemption-The Long Island Rail Road Company, FD 33300, STB served Nov. 17, 1997; I&M Rail Link, LLC—Acquisition and Operation Exemption—Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway, FD 33326, STB served April 2, 1997 ("*I&M Rail Link*"); and New England Central Railroad, Inc.—Acquisition and

¹⁵ Its website states, "**Protect the Adirondacks!, Inc** is a grassroots, membership conservation organization dedicated to the protection, stewardship and sustainability of the natural ..." (sic) www.protectadks.org. Simply stated, Protect's motivation is "NIMBY", defined as "not in my backyard." Never mind that existing minerals traffic in its "backyard" would be taken off the highways if Saratoga succeeds in its efforts to induce NL and Barton Mines to use the Tahawus Line.

Operation Exemption—Lines Between East Alburgh, VT, and New London, CT,
FD 32432, ICC served Dec. 9, 1994 (“*New England Central*”). And even where
the agency found some scrutiny was warranted, it did not reject or revoke the
challenged exemptions. It merely imposed a short “housekeeping stay” to provide
additional time needed for a review. And after that review, the agency permitted
those exemptions to take effect. *New England Central* and *I&M Rail Link*, *supra*.

While the November 23 Decision suggests that the Board has had a
consistent policy that NOE’s are only to be used for routine and non-controversial
cases, a review of agency precedent suggests otherwise. Id; Railroad Ventures,
Inc.—Acquisition And Operation Exemption—Youngstown & Southern Railroad
Company, FD 33385, STB served July 15, 1997. In short, the Acting Director
misused her discretion to summarily reject an NOE that is appropriate for
consideration and acceptance despite Protect’s opposition.

By accepting the protestant’s assertions at face value without considering
Saratoga’s responses, the Acting Director improperly shifted the burden of proof to
Saratoga in violation of precedent.¹⁶ After repeating the allegations by both
Protect and then by Saratoga in its Reply, the Acting Director appears to have

¹⁶ The U.S. Court of Appeals for the District of Columbia Circuit has previously
emphasized the importance of properly allocating the burden of proof in Board proceedings.
New York Cross Harbor Railroad v. Surface Transportation Board, 374 F.3d 1177 (2004).

accepted as gospel two of Protect's assertions (regarding lack of rail freight shipments and Saratoga's alleged passenger operations) while ignoring Saratoga's substantial responses. Her action in so doing contravenes Board policy that squarely places the burden of proof on the party urging rejection. General Railway Corporation, d/b/a Iowa Northwestern Railroad-Exemption For Acquisition of Railroad Line-In Osceola And Dickinson Counties, IA, FD 34867, STB served June 15, 2007, slip op at 4 (cited as "*General Railway*") ("A party seeking revocation or rejection of a notice of exemption has the burden of demonstrating that the notice contains false or misleading information, or that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101").

While Protect has made a series of allegations about omitted information, neither it nor the Acting Director identifies any specific provisions in the Board's regulations covering class exemptions for the acquisition and operation of rail lines that would have required such information. The most that can be said about the "omissions" is that they deal with the status, extent, and quality of NL's title to the underlying real estate; the alleged easement limitations; the location of the right of way in Adirondack Park;¹⁷ the freight needs of NL and Barton Mines, and the

¹⁷ The Board can take official notice of the fact that rail lines frequently traverse parklands. BNSF's former Great Northern mainline, which bisects Glacier National Park, is a high density

alleged environmental and historic impacts of the Tahawus Line. The Protest contains no verified testimony, newspaper articles, or other information that could rightfully be termed “evidence.”

To the extent there was any incorrect or missing information in Saratoga’s NOE, that shortcoming would have to be *materially* false or misleading for the Board to reject the NOE. *See, San Francisco Bay Railroad-Mare Island-Operation Exemption-California Railroad*, FD 35304, STB served Dec. 6, 2010, slip op. at 3-4 and cases cited therein (“‘Material’ means the transaction would not have otherwise qualified for an exemption”). Issues involving titles to real estate are beyond both the jurisdiction and the expertise of the Board and therefore not even a factor in considering whether a proceeding is “controversial.” *General Railway, supra* at 4. To the extent that the Acting Director believed that essential information was missing, she merely could have issued a ruling along the lines of that issued in *Pro-Go Corp.-Operation Exemption-In Suffolk County, NY*, FD 35120, STB served March 13, 2008, highlighting issues requiring clarification and rejecting the notice without prejudice to refiling the proposal as a new NOE.

route handling numerous through freight trains and Amtrak’s *Empire Builder* passenger train without any apparent adverse effect on the environment.

While the Acting Director appears to have treated Protect's protest just as a petition to reject, Board precedent would have been equally contravened had she treated the protest as a petition to revoke. Under 49 U.S.C. §10502(d), the Board can revoke an exemption if it finds that application of a statutory provision is necessary to carry out the rail transportation policy of 49 U.S.C. §10101 ("RTP"). The Board has previously held that it will look to those portions of the RTP that are relevant or pertinent to the underlying statute—which here is, 49 U.S.C. § 10902—in considering petitions to revoke. *Cf. Vill. of Palestine v. ICC*, 936 F.2d 1335 (D.C. Cir. 1991). The party seeking revocation has the burden of showing that regulation is necessary to carry out the RTP, 49 C.F.R. § 1121.4(f), and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and more detailed scrutiny of the transaction is necessary. See Consol. Rail Corp.—Trackage Rights Exemption—Mo. Pac. R.R., FD 32662 (STB served June 18, 1998). Protect has not asked for revocation nor alleged any basis for such action, and the Acting Director's decision did not treat the protest as a revocation request. Even if she had, there is no basis for revoking the exemption any more than for rejecting it.

3. Saratoga is prejudiced by the Acting Director's rejection of its NOE

As a practical matter, the Acting Director's rejection of Saratoga's NOE and her blithe suggestion that Saratoga "may file a petition for an individual exemption or a full application" represents prejudicial error. Saratoga is anxious to commence rehabilitation of the Tahawus Line and solicit new customers. NL desires to use rail for its transportation needs. Requiring Saratoga to re-file its request as either a formal application, or even as an individual petition for exemption with the required supporting documents, would be expensive, time consuming, and contrary to Congressional policy for reduced regulation over short line railroad entry. In fact, from a cost perspective alone, re-filing this entry request would increase Saratoga's legal and filing costs roughly three-fold without any corresponding public benefit. Similarly, requiring a re-filing would impose a significant and unwarranted regulatory delay. Although the Board can take as little as three months to decide an individual petition for exemption, it has the ability to extend that time an additional nine months should further proceedings be warranted. 49 U.S.C. § 10502(b). Filing a formal application would require Saratoga to submit vast amounts of unnecessary information in the absence of a granted waiver request. Furthermore, unlike the situation with formal applications used in abandonment and control proceedings, there appears to be no outside statutory or regulatory deadline for the agency to reach a decision. Again, neither

the protest nor the November 23 Decision has adduced any compelling fact-based or jurisdictionally relevant reason for subjecting Saratoga to this additional delay.

CONCLUSION

The November 23 Decision rejecting Saratoga's NOE reflects a clear error of judgment on the Acting Director's part. She appears to have relied on Protect's letter that was based upon unsupported conjecture largely on matters outside the purview of the Board. This protestant did not request or cite a legal basis for either rejection or revocation of the exemption and did not bear its burden of proof. Moreover, the November 23 Decision did not address the Board's standards for rejection or revocation, was contrary to agency precedent, and cited as facts information contrary to the evidence of record. It should be reversed and the exemption should be permitted to take effect immediately.

Respectfully submitted,



John D. Heffner
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1700 K Street, N.W.
Suite 640
Washington, D.C. 20006
(202) 742-8607

Counsel for Petitioner

Dated: December 2, 2011

List of Exhibits:

- A October 25, 2011 Notice of Exemption
- ~~C~~ ~~B~~ November 23, 2011, decision issued by the Acting Director
- ~~B~~ ~~C~~ Protest filed by Protect the Adirondacks! Inc.
- D Verified Statement of Stephen Gregory
- E Support letter from NL Industries, Inc.

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that I have sent a copy of Appeal of Acting Director's Decision" of Saratoga and North Creek Railway, LLC, to the following person by email transmission and by first class United States mail this 2nd day of December 2011.

John W. Caffry, Esq.
Caffry and Flower,
100 Bay Street
Glens Falls, NY 12801
jcaffry@caffrylawoffice.com

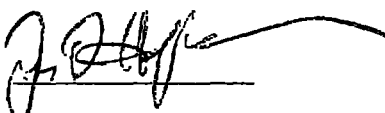
By: 
John D. Heffner

EXHIBIT A

October 25, 2011

JOHN HEFFNER
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john.heffner@strasburger.com

Cynthia A. Brown
Surface Transportation Board
395 E. Street, S.W.
Washington, D.C. 20423-0001

ORIGINAL

RE: FD 35559, Saratoga And North Creek Railway, LLC-Operation Exemption-Tahawus Line

201173

Dear Ms. Brown:

On behalf of Saratoga And North Creek Railway, LLC, I am submitting an original and ten copies of a Verified Notice of Exemption pursuant to 49 U.S.C. 10902 and 49 CFR 1150.41. In addition, I am enclosing with this filing a filing fee check payable to the Board for \$1800 and a copy of this filing on a computer disk.

Please date stamp and return one copy of this filing.

Sincerely yours



John Heffner

10/25/2011

Pr. 11/1/2011

Enclosure

ORIGINAL

FEE RECEIVED

OCT 25 2011

**SURFACE
TRANSPORTATION BOARD**

FILED

OCT 25 2011

**SURFACE
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Strasburger & Price, LLP

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BEFORE THE
SURFACE TRANSPORTATION BOARD

2011 25

ORIGINAL

FD 35559

**SARATOGA AND NORTH CREEK RAILWAY, LLC
—OPERATION EXEMPTION—
TAHAWUS LINE**

**VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 U.S.C. 10902 and 49 CFR 1150.41**

Submitted By:

John D. Heffner
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(202) 742-8607

Counsel for Petitioner

ORIGINAL

Dated: October 24, 2011

10/17/25

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35559

**SARATOGA AND NORTH CREEK RAILWAY, LLC
—OPERATION EXEMPTION—
TAHAWUS LINE**

**VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 U.S.C. 10902 and 49 CFR 1150.41**

Saratoga and North Creek Railway, LLC (“Saratoga”), a limited liability company and existing class III short line rail carrier, files this Notice of Exemption, pursuant to 49 C.F.R. Part 1150, Subpart D – Exempt Transactions, with the Surface Transportation Board (the “Board”) to permit it to operate about 29.71 miles of a private line of railroad (“the Line” or “the Tahawus Line”). Presently, the Line is owned by NL Industries, Inc. (“NL”), an industrial concern which is selling it to Saratoga in the very near future. The Line extends between the existing connection with Saratoga at MP NC 0.0 at North Creek and its terminus at MP NC 29.71 at Newcomb, NY. Upon acquisition, Saratoga intends to provide common carrier railroad service over the subject line connecting to its existing

trackage at North Creek and extending to its connection with the Delaware & Hudson Railway d/b/a Canadian Pacific ("CP") at Saratoga Springs, NY.¹

INFORMATION REQUIRED BY 49 CFR 1150.43

<u>Name and Address of Applicant</u>	49 CFR 1150.43(a)
Saratoga and North Creek Railway, LLC	
c/o Iowa Pacific Holdings, LLC	
118 South Clinton Street	
Suite 400	
Chicago, IL 60661	

<u>Applicant's Representative</u>	49 CFR 1150.43(b)
John D. Heffner	
Strasburger & Price	
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Washington, D.C. 20006	
(202) 742-8607	

<u>Statement of Agreement</u>	49 CFR 1150.43(c)
Saratoga has executed an agreement to acquire the subject rail line from NL	

in the very near future. It anticipates consummating this acquisition before this notice becomes effective.²

¹ The Board had previously authorized Saratoga to operate between Saratoga Springs and North Creek in two prior proceedings. In FD 35500, it exempted Saratoga's acquisition and operation over an exclusive, permanent operating easement on track and right of way owned by the Town of Corinth. In FD 35500, Sub-No. 1, the Board granted Saratoga an exemption to operate over trackage acquired by Warren County from CP after its abandonment. See, Saratoga and North Creek Railway, LLC—Acquisition and Operation Exemption—Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific, FD 25500, STB served June 1, 2011 and Saratoga and North Creek Railway, LLC—Operation Exemption—Warren County, N.Y., FD 35500 Sub. No. 1, STB served June 1, 2011.

Operator of the Property

49 CFR 1150.43(d)

Saratoga will provide all common carrier rail operations over the subject rail line.

Brief Summary of Transaction

49 CFR 1150.43(e)

Saratoga is a recently established limited liability company and class III short line rail carrier indirectly owned by short line holding company Iowa Pacific Holdings, LLC, and its wholly-owned noncarrier subsidiary, Permian Basin Railways.³ IPH/Permian Basin formed Saratoga for the purpose of operating the entire Tahawus Line between Newcomb on the north and Saratoga Springs on the south interchanging traffic with CP at Saratoga Springs.

The Line was originally constructed by the United States Government earlier in the 20th Century to transport minerals being mined in northern New York State.

More recently the Line has been owned by NL and operated as a long private piece

² Inasmuch as the subject trackage is an industry-owned spur track exempt from Board regulation under 49 U.S.C. 10906 and has never been operated in common carrier service, Saratoga does not need any Board authority to acquire this trackage as such property is outside the Board's jurisdiction. *See, See B. Willis, C.P.A., Inc.—Petition for Declaratory Order*, STB Finance Docket No. 34013 (STB served Oct. 3, 2001) (*B. Willis*), *aff'd sub nom. B. Willis, C.P.A., Inc. v. STB*, 51 Fed. Appx. 321 (D.C. Cir. 2002). Private track is typically built by a shipper (or its contractors) to serve only that shipper, moving the shipper's own goods, so that there is no "holding out" to serve the public at large. *B. Willis*, slip op. at 2.

³ Saratoga in turn is wholly owned by San Luis & Rio Grande Railroad ("SLRG"), an existing class III short line rail carrier subsidiary of Permian Basin Railways. Control of Saratoga by SLRG and in turn Permian Basin Railways and Iowa Pacific Holdings was exempted by the Board in San Luis & Rio Grande Railroad—Continuance in Control Exemption—Saratoga and North Creek Railway, LLC, FD 35499, STB served June 1, 2011.

of railroad by CP's predecessor, the Delaware & Hudson Railroad as a contractor for that customer. On or about July 1, 2011, Saratoga restored common carrier rail service between North Creek and Saratoga Springs and issuance of this exemption will permit it to restore service over the Tahawus Line serving NL and other shippers who desire to have rail service.

The conversion of "private" or industry owned track to common carrier service by an existing Board-licensed rail carrier is appropriate for exemption under 49 U.S.C. 10902 and 49 CFR 1150.41. Section 1150.41 of those rules provides, except as indicated in paragraphs (a) through (d) of this section, that this exemption applies to acquisitions or operations by Class III rail carriers under section 10902. The Board routinely authorizes by exemption the conversion to and common carrier operation of what had previously been private or industry owned trackage such as that currently owned by NL.⁴ The fact that Saratoga will be holding out to serve the public at large is determinative of its status as a common carrier.

⁴ Sec. Effingham R.R. Co.—Pet. For Declaratory Order, 2 S.T.B. 606 (1997).

Other information required

(1) The name and address of the party transferring the subject property:

No property will be transferred as a result of this filing. However, Saratoga will be initiating common carrier operations over track it will be acquiring outside the jurisdiction of the Board.

The name and address of the owner/operator is:

Saratoga & North Creek Railway, LLC
c/o Iowa Pacific Holdings, LLC
118 South Clinton Street
Suite 400
Chicago, IL 60661

(2) The proposed time schedule for consummation of the transaction:

Saratoga intends to consummate this transaction at least 30 days from the effective date of this notice, probably around late November 2011.

The mileposts of the subject property, including any branch lines:

The subject trackage extends between MP NC 0.0 at North Creek and its terminus at MP NC 29.71 at Newcomb, NY.

The total route miles to be operated:

About 29.71 miles of railroad.

Map

49 CFR 1150.43(f)

A map depicting the railroad trackage to be operated is attached as Exhibit A.

Certificate of Carrier Classification 49 CFR 1150.43(g)

Saratoga certifies that with this transaction its projected annual revenues will be less than \$5,000,000 annually. A certificate complying with the provisions of 49 CFR 1150.43(g) is attached as Exhibit B to this notice.

Transactions Imposing Interchange Commitments 49 CFR 1150.43(h)

Not applicable. There are no agreements applicable to the Line imposing any interchange commitments. The subject line of railroad does not physically connect with any rail lines other than the contiguous lines owned by Warren County and in turn the Town of Corinth. Consequently, Saratoga will not be able to interchange with any carriers other than CP.

Disclosure of Intent to Transport Waste

Saratoga's license with the Town of Corinth does not permit the collecting, sorting, loading, unloading, transferring, or transporting of municipal solid waste ("MSW") or construction and demolition ("C&D") material so it will not be handling this traffic on the subject line as well.

Labor Protection

Labor protective conditions are not applicable to transactions under 49 U.S.C. 10902.

Caption Summary 49 CFR 1150.44


A caption summary in the prescribed form is attached as Exhibit C to this Notice.

Environmental and Historic Preservation Data 49 CFR 1105

Pursuant to 49 CFR 1105.6(c) (2), the proposed transaction is exempt from environmental review under 49 CFR 1105(c) (2) (i), because the actions proposed herein will not cause any operating changes that exceed the thresholds established in 49 CFR 1105.7(e) (4) or (5).

In addition, this transaction is exempt from historic review under 49 CFR 1105.8(b) (1). Under this section, a sale, lease or transfer of a rail line is exempt if rail operations will continue. Further Board approval is required for the parties to abandon service, and there are no plans to dispose of or alter the properties subject to Board jurisdiction.

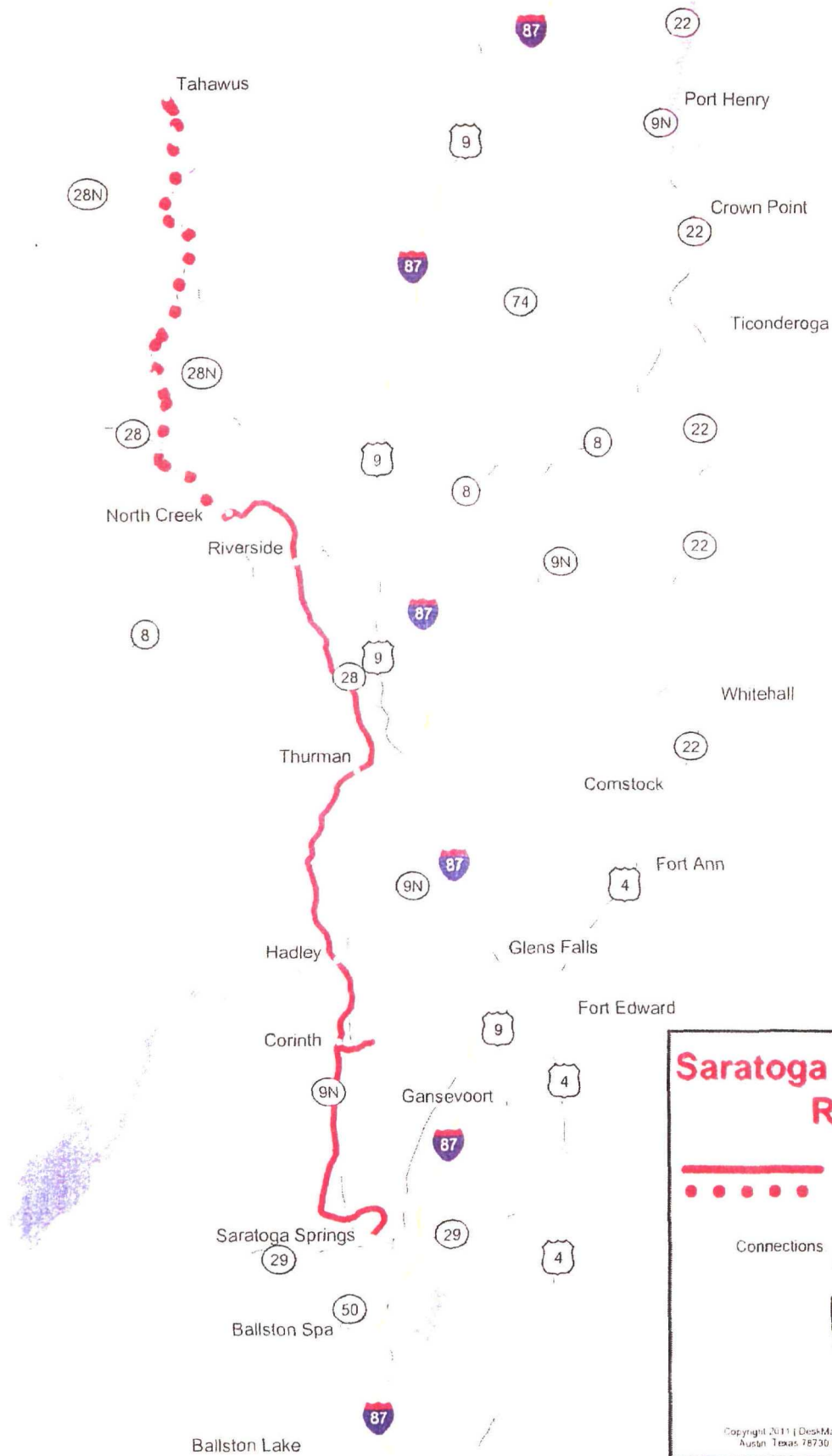
Submitted By:

A handwritten signature in black ink, appearing to read "J. D. Heffner", with a long, sweeping horizontal line extending to the right.




John D. Heffner
Strasburger & Price
1700 K Street, N.W.
Suite 640
Washington, D.C. 20006
(202) 742-8607
Counsel for Petitioner

Dated: October 24, 2011

EXHIBIT A



Saratoga & North Creek Railway

 SNC Saratoga & North Creek Railway
 O/S SNC - Out of Service
 CPRS Canadian Pacific

Connections SNC with CPRS at Saratoga Springs



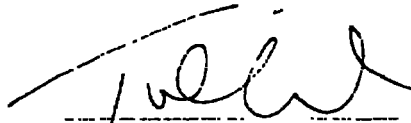
Copyright 2011 | DeskMap Systems Inc. | 6801 Vaught Ranch Rd
Austin, Texas 78730 | (512) 346-9330 | www.dr-1map.com

Exhibit B

Certification

I, Todd N Cecil, certify that I am Vice President-Real Estate Development of Permian Basin Railways, Inc., holding company owner of Saratoga and North Creek Railway, LLC, and that applicant's projected revenues will not exceed \$5 million annually and will not result in the applicant becoming a Class I or Class II carrier under the provisions of 49 CFR 1201.1-1)

Dated: October 24, 2011



Signature

EXHIBIT C

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35559

**SARATOGA AND NORTH CREEK RAILWAY, LLC
—OPERATION EXEMPTION—
TAHAWUS LINE**

**VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 U.S.C. 10902 and 49 CFR 1150.41**

Saratoga and North Creek Railway, LLC ("Saratoga"), a limited liability company and class III short line rail carrier, files this Notice of Exemption, pursuant to 49 C.F.R. Part 1150, Subpart D – Exempt Transactions, with the Surface Transportation Board (the "Board") to permit it to operate about 29.71 miles of a private line of railroad ("the Line" or "the Tahawus Line"). Presently, the Line is owned by NL Industries, Inc. ("NL"), an industrial concern which is selling it to Saratoga in the very near future. The Line extends between the existing connection with Saratoga at MP NC 0.0 at North Creek and its terminus at MP NC 29.71 at Newcomb, NY.

Saratoga certifies that its projected annual revenues as a result of this transaction would not exceed those that would qualify it as a Class III rail carrier and further certifies that its projected annual revenues will not exceed \$5 million.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. §10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than November __, 2011 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to FD No. 35559, must be filed with the Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, one copy of each pleading must be served on John D. Heffner, Esq., Strasburger & Price, 1700 K Street, N.W. – Suite 640, Washington, D.C. 20006, Telephone: (202) 742-8607 counsel for Saratoga.

**Board decisions and notices are available on our website at
WWW.STB.DOT.GOV.**


Decided:

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

VERIFICATION

STATE OF TEXAS)
) SS
COUNTY OF BEXAR)

Todd N. Cecil, being duly sworn according to law, hereby deposes and states that he is holds the position of Vice President - Real Estate Development with Permian Basin Railways, holding company owner of Saratoga and North Creek Railway, LLC, is authorized to make this Verification, has read the foregoing document, and knows the facts asserted therein are true an accurate as stated, to the best of (her) his knowledge, information, and belief


Todd N. Cecil

Witness my hand and official seal



My Commission Expires

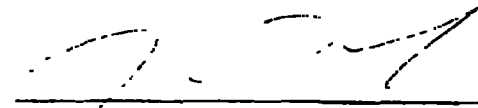

Printed Name Juan Hernandez
Residing in San Antonio County, Texas
11/25/12

EXHIBIT B



231287

Charles M. Clusen, Lorraine M. Duvall, Robert A. Harrison • Co-Chairs

ENTERED
Office of Proceedings

NOV 11 2011

VIA OVERNIGHT COURIER

PAID
Public Record

November 11, 2011

Cynthia A. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street SW
Washington, DC 20423-0001



Re: FD 35559 Saratoga and North Creek Railway LLC – Operation Exemption – File # 231173

Dear Ms. Brown:

On behalf of Protect the Adirondacks! Inc. ("Protect!"), a 501(C)(3) not-for-profit conservation organization incorporated in the State of New York, I am writing to protest the Notice of Exemption ("Notice") filed with the Surface Transportation Board ("STB") on October 25 by John D. Heffner, Esq. of Strasburger and Price, 1700 K Street NW, Suite 640, Washington, DC 20006-3817 for the Saratoga and North Creek Railway, LLC ("SNCR"), c/o Iowa Pacific Holdings, LLC, 118 South Clinton Street, Suite 400, Chicago, IL, 60661. An additional ten (10) copies of this letter are enclosed.

In its Notice, SNCR has omitted much important information. Protect! believes that collectively these omissions seriously misrepresent the situation. This case is much more complex than Mr. Heffner and SNCR have represented to the STB. It is our objective in this letter to present additional information that may assist the Board in making a decision as to whether or not to approve the requested exemption at this time.

SNCR, a Class III carrier, states in its Notice that during the present month of November it will implement an agreement that it already has executed with NL Industries Inc. ("NL") of 3 Lincoln Centre, 5430 LBJ Freeway, Suite 1700, Dallas TX, 75240-2697 to purchase from NL what SNCR references as the "Tahawus Line" or, just, "the Line," which in fact is an elongated industrial spur that runs for 29.71 miles from North Creek, N.Y. northward to its terminus at the location of the former mining hamlet of Tahawus where NL's former ilmenite mine was located. As a common carrier, SNCR intends to operate a tourist train over the entire 29.71 miles of track.

Please be aware that the right-of-way ("ROW") for the Tahawus line exists as easements on a mix of public and private land. In other words, NL does not own the ROW in full fee title. Also, NL's ownership of the ROW easements is disputed, as discussed below.

SNCR represents in the Notice that the trackage from North Creek to Tahawus is seamlessly of a piece with that which runs southward from North Creek to Saratoga Springs where it connects with the main line, operated by Canadian Pacific, for which SNCR received an exemption from the STB last June and began operating on July 1. However, it is not all of a piece, with the North Creek to Tahawus line having been built as a spur for one purpose, and for one purpose only, which is fully documentable in deeds and court records. That singular purpose is hauling ilmenite ore from Tahawus. In proposing to operate on this spur as a common carrier, SNCR is trying to make the spur into something it was never legally intended to be.

Basis for Protect!'s Protest of the Notice of Exemption

1. In 1826 the MacIntyre Mine began mining for magnetite iron ore on the Hudson River near its headwaters, at the base of the south side of the High Peaks of the Adirondack Mountains. By 1855 the enterprise had failed because of its isolation, transportation costs to take out the smelted iron, and an impurity in the ore, ilmenite, that was costly to remove in the smelting process.
2. Fast forward to 1940 when NL purchased the property to mine, in open pits next to the Hudson River, for the ilmenite ore, from which titanium dioxide is derived. This was a strategic mineral during World War II because its major sources were overseas. With the threat of German submarines being ever-present, a domestic source of ilmenite had to be developed.
3. In 1941, under wartime emergency powers, the federal government appropriated, by eminent domain, ROW easements on which to construct a rail spur from North Creek to the new NL mine where the hamlet of Tahawus was being built. It is important to note, once more, that the federal government did not appropriate a fee title interest in the ROW lands, only easements. And, of the approximately 30 miles of ROW easements, 13 miles are on State-owned Forest Preserve land and 17 miles are on a number of parcels of privately-owned land. The private land easements were permanent, whereas those on the State Forest Preserve were term easements, as discussed below. The rail spur was constructed in 1941 by the federal government at a cost of \$3.0 million. Immediately thereafter the ROW easements, the rails and other appurtenances were leased to NL and the hauling of ore began.
4. The State Forest Preserve was established by state law in 1885, and in 1894 it was given protection under the State Constitution, today numbered as Section 1 of Article 14. It is inviolate as "forever wild" land and cannot be "leased, sold or exchanged" unless an exception is made by enactment of legislation in each of two successive two-year sessions of the State Legislature, with each bill signed into law by the Governor, and then approved by the voters in a referendum as a proposition on the ballot in the next statewide general election.
5. The entire State Forest Preserve, lying in the Adirondack and Catskill counties that are named in law, is a National Natural Landmark on the National Register of Historic Places, as well as on the State Register of Historic Places. The Adirondack Forest Preserve is managed by the NYS

Department of Environmental Conservation ("DEC")(625 Broadway, Albany , N.Y. 12207) under the guidance of the Adirondack Park State Land Master Plan ("APSLMP"). The 13-miles of State Forest Preserve on which the Tahawus rail spur lies is all within the Vanderwhacker Wild Forest Unit Management Area as classified by the Adirondack Park Agency (see below) under the APSLMP.

6. The Tahawus rail spur lies entirely within the Adirondack Park. In 1892, the Adirondack Park was created by State law as an area within which to acquire land for the State Forest Preserve. Today the Park, after several expansions of its boundaries, is now about six million acres in size, roughly the size of Vermont, New Hampshire or Massachusetts. Within the Park there is a checkerboard pattern of private land and State Forest Preserve land, in a roughly 52 to 48 percent ratio. In 1971, the State of New York established the Adirondack Park Agency ("APA") (P.O. Box 99, Ray Brook, N.Y., 12477) to administer the private land in the Park in accordance with an ecologically-based State-adopted Land Use and Development Plan, to classify State land under the APSLMP and to approve unit area management plans prepared by DEC, among other duties.

7. In response to the 1941 appropriation by the federal government of the ROW easements on the State Forest Preserve, in violation of Article 14 of the State Constitution, the State of New York, after direct personal correspondence between Governor Lehman and President Roosevelt, and the Association for Protection of the Adirondacks, Inc. ("Association"), one of Protect!'s predecessor organizations, went to federal court for relief. The State, wanting the easements and rails on the State Forest Preserve removed at the end of World War II, lost in the lower court, obtained a split decision in the U.S. Court of Appeals, and requested the U.S. Supreme Court to take the case. That didn't happen and there it ended. The final result was that the term for the easements on the State Forest Preserve was fixed to terminate 15 years after the end of the war because the federal agency said that it needed that time to amortize its \$3.0 million investment in the construction of the railroad spur. However, President Truman did not declare the war to be officially over until 1952, meaning that the easements wouldn't revert to the fee title owners of the land until 1967. In any event, once NL began operating the railroad beyond the end of the war, there was no longer a "wartime emergency," and the operation was thereafter solely for the commercial benefit of NL.

8. In 1962, the federal General Services Administration ("GSA"), under pressure from Congress to sell surplus property, proposed to sell the ROW easements and rails to NL. The State objected, whereupon GSA instituted another eminent domain proceeding and extended the term of the easements on the State Forest Preserve for 100 years to 2062. This time the State did not go to court, presumably because of the negative experience in the 1940s. In 2012 we will be halfway to 2062.

9. Then, in 1982, NL ceased active mining at Tahawus and thus began a series of events that clearly indicate that NL will never again haul ore on the rail spur again.

a. Until 1989, NL used the railroad to ship out crushed stone from the tailings piles, for use as road building material. In the summer of that year, NL sold the rolling stock and abandoned the rail spur. Since then some magnetite iron ore from the tailings piles has continued to be taken out by truck.

b. In the fall of 1989, GSA auctioned the spur (ROW easements, rails, appurtenances). NL was the sole bidder, at \$950,000. A month later it put its new property at arm's length for tax

purposes by turning it over to the Essex County Industrial Development Agency with the right to buy it back at any time for one dollar.

c. After passage of the State Environmental Quality Bond Act in 1986, DEC started negotiations with NL to buy in fee that part of NL's 11,500 acre mining property that was north of the open pits and runs up into the High Peaks, while taking a conservation easement on the southerly part of the property. After 1989 this negotiation changed. Throughout the entire 1990s NL wanted to sell the entire property, clearly indicating its intention to never start mining again. However, the State could not purchase all of it because the area around the pits and the mill buildings was seriously contaminated.

d. By the mid-1990s DEC had requested the Open Space Institute ("OSI"), a not-for-profit regional land trust, to continue the negotiation. In 2003 OSI purchased about 10,000 acres, leaving NL with 1,200 acres, the contaminated core of the property. OSI, after getting subdivision approval from APA in April, 2006, subsequently sold 7,000 acres of the High Peaks portion to the State and 3,000 acres in the southerly part of the property to a private industrial forestland company, while retaining a few small parcels.

e. In February 2005, NL and OSI obtained a letter from the NYS Department of Transportation which said that the rail spur was considered by that agency to be abandoned. Then, in June, 2005, OSI and NL applied jointly to APA to subdivide the rail spur and remove the rails on the 13-mile State Forest Preserve section of the ROW and northward of that segment, while leaving them in place on the southerly end of the spur to provide service to Barton Mines. After more than 100 years of operation, Barton Mines still produces thousands of tons of some of the best industrial garnets in the world. Since the abandonment of the rail spur by NL in 1989, this product has been hauled out by truck. This application was withdrawn by OSI and NL at the end of 2005 after questions were raised by Protect!'s predecessor organization, the Association, about ownership of the ROW easements.

f. In 2006, NL demolished all of the mill buildings on its remaining property and began cleaning up the site.

Questions and Issues Raised By the Notice

A. There is no "Tahawus Line," and there never was a Tahawus Line. There is only the abandoned industrial spur from North Creek to Tahawus and the now defunct NL mine where active mining stopped in 1982, and there has been a steady shut-down ever since.

B. A study in 2004 estimated that it would cost at least \$5.0 million to rehabilitate the Tahawus rail spur and bring it up to safety standards. That cost would be higher now. It would take a substantial amount of time to carry out this work. Yet SNCR suggests at the bottom of page 2 of its Notice that it will be ready to operate as a common carrier "upon acquisition."

C. The Notice says nothing about the fact that the ROW consists of easements rather than land owned in fee. This is a major omission.

D. On page 5 of the Notice, SNCR advises that it will restore service on the Tahawus rail spur and "serve NL and other shippers who desire to have rail service." However, as discussed above, NL has ceased mining and there is nothing left at the NL site except a small office structure. There is no crusher, and there are no other structures. However, Barton Mines is still shipping thousands of tons of garnets a year by truck and might want rail service again, at the southern end of the spur. . There are no other potential non-carrier industrial customers near the Tahawus spur.

E. SNCR states that it will use all 29.71 miles of this trackage, suggesting that the northern terminus of the common carrier service will be on the highly contaminated 1200-acres of NL industrial mined land that NL could not sell to the State, raising questions of passenger safety. Further, it is in a very isolated area, with nothing around for miles. Passengers would have to be bused from that location near the foot of the High Peaks to other places, raising questions about whether or not a marketing study has been done.

F. Protect! disagrees with the Notice's claim on page 8 that the action is exempt from environmental review. Because the Tahawus spur has been abandoned since 1989, the resumption of rail traffic will result in an increase in rail traffic of over 100% and an increase in rail yard activity at the currently unused northern terminus of over 100%. Therefore, the action exceeds the thresholds of 49 C.F.R. 1105.7(e)(4) & (5), so it is not exempt under 49 C.F.R. 1105.6(c)(2). Instead, it appears that the action requires an Environmental Assessment, and potentially an Environmental Impact Statement, under 49 C.F.R. 1105.6(b)(4)(i) and other applicable regulations.

G. Likewise, it appears that a Historic Report is required under 49 C.F.R. 1105.8(a), et seq. All of the State Forest Preserve is a National Natural Landmark, listed on the National Register of Historic Places, including that land which underlies the 13-miles of ROW easements on the Vanderwhacker Wild Forest State lands. It would seem that an historic assessment should be required. Part of that assessment would include the fact that the State Forest Preserve has very strong protection under Article XIV of the State Constitution for over a century, a level of protection unlike that provided for federal lands or for public lands in any other state. The statement on page 8 of the Notice to the effect that the transaction is exempt from historic review "if rail operations will continue" is puzzling because the Tahawus rail spur has not continued operating at all. NL ceased operating in 1989 and the spur has been deemed abandoned by the New York State Department of Transportation for many years.

Conclusions

The Tahawus rail spur was abandoned 22 years ago. Further, court records and deeds show that the ROW easements on the Forest Preserve were taken by eminent domain during a wartime emergency, strictly for the purpose of constructing a rail spur over which to haul ilmenite ore from Tahawus. These ROW easements cannot legally be used for any other purpose.

Under these circumstances, the ROW easements should be considered as having been extinguished and as having reverted to the fee title owners of the ROW land, including, but not limited to, the Forest Preserve lands belonging to the State of New York. With the ROW easements having reverted, the rails constitute an illegal occupancy of the State Forest Preserve and they should be removed by NL, or any subsequent owner, as soon as possible.

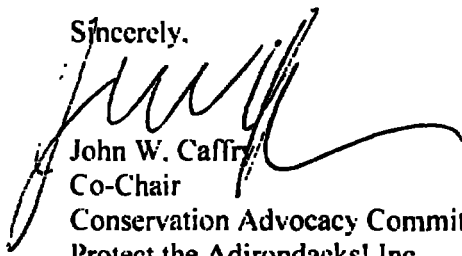
NL is well aware of Protect!'s position in this matter. On March 1, 2010 Protect! wrote to Harold Simmons, NL's board chairman and CEO, offering to support the rail removal plan that NL and OSI submitted jointly to APA in June, 2005. This plan would leave the rails in place from North Creek northward to Barton Mines and remove the rails on the State Forest Preserve and northward from there to Tahawus. This offer was contingent on recognition by NL that the ROW easements on the State Forest Preserve land had reverted to the State's fee title ownership. We received no reply.

If SNCR proceeds with its proposal to buy the ROW easements and the rails and appurtenances, it will also be buying the potential title problems described in this letter.

We hope that STB will proceed to carefully review this matter in accordance with the applicable law and regulations.

Please let us know if we can provide any other information that will aid STB in making its decision.

Sincerely,



John W. Caffry
Co-Chair
Conservation Advocacy Committee
Protect the Adirondacks! Inc.

c/o Caffry and Flower, Attorneys at Law
100 Bay Street
Glens Falls, NY 12801
518-792-1582
jcaffry@caffrylawoffice.com

JWC/CCM/ljs

cc:

John D. Heffner, Esq.
Strasburger and Price
1700 K Street Suite 640
Washington DC 20006

Ken Ellis, President
Saratoga and North Creek Railway LLC
c/o Iowa Pacific Holdings, LLC
118 South Clinton Street, Suite 400
Chicago, IL 60661

Eric T. Schneiderman. Esq.
Attorney General. State of New York
The Capitol
Albany, NY 12224-0341

Marc S. Gerstman. Esq.
Executive Deputy Commissioner
NYS Department of Environmental Conservation
625 Broadway
Albany, NY 12207

Terry Martino
Executive Director
Adirondack Park Agency
Box 99
Ray Brook, NY 12977

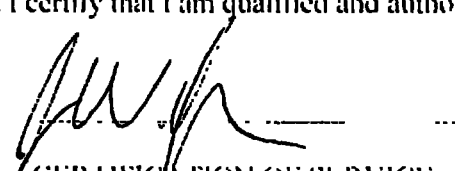
Ruth Pierpont
Deputy Commissioner for Historic Preservation
NYS Office of Parks, Recreation and Historic Preservation
Agency Building 1, Empire State Plaza
Albany, NY 12238

Raymond Hessinger
Director, Freight and Passenger Rail Bureau
NYS Department of Transportation
50 Wolf Rd.
Albany, NY 12233

VERIFICATION

I, John W. Callry, as Co-Chair of the Conservation Advocacy Committee of Protect the Adirondacks! Inc. declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge. Further, I certify that I am qualified and authorized to file this pleading.

November 11, 2011



CERTIFICATION OF SERVICE

I hereby certify that I have served all parties of record in this proceeding with this document by United States mail.

November 11, 2011

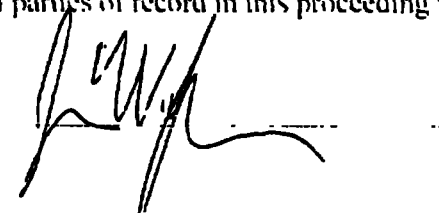


EXHIBIT C

SERVICE DATE – LATE RELEASE NOVEMBER 23, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35559

SARATOGA AND NORTH CREEK RAILWAY, LLC
OPERATION EXEMPTION–TAHAWUS LINE

Decided: November 23, 2011

This decision rejects the notice of exemption filed in this proceeding.

On October 25, 2011, Saratoga and North Creek Railway, LLC (Saratoga), a Class III rail carrier, filed a verified notice of exemption under 49 U.S.C. § 10902 and 49 C.F.R. § 1150.41 to operate, as a line of railroad, approximately 29.71 miles of private track owned by NL Industries, Inc. (NL). Saratoga calls the private track the “Tahawus Line.” The track runs between its existing connection with Saratoga at North Creek, N.Y., and its terminus at Newcomb, N.Y. The exemption is scheduled to become effective on November 24, 2011.

The notice indicates that Saratoga intends to restore rail service on the track by serving NL and other shippers. The notice also states that Saratoga plans to acquire the 29.71-miles of track before this notice is scheduled to become effective. Saratoga states that the subject track has never been operated in common carrier service and that, therefore, Saratoga does not need any Board authority to acquire it.

On November 14, 2011, Protect the Adirondacks! Inc. (Protect), a non-profit organization, filed a petition to reject Saratoga’s notice of exemption.¹ In its petition, Protect argues that Saratoga’s claim that it will provide common carrier service to NL is not credible. Protect also argues that the transfer and proposed operations represent an attempt to defeat other property interests and to subvert the acquisition of the land for a state forest preserve within Adirondack Park, a state park. The track at issue here lies within the park. In support of its argument, Protect notes that NL ceased mining operations in 1982, that the track would need rehabilitation in excess of \$5 million in order to meet current safety standards, and that NL demolished most of its mill buildings in 2006. Protect also states that, other than a mine located near the southern end of the track that ships garnet stones via truck, there are no other potential customers on or near the track, and that Saratoga’s primary intention is to operate a passenger tourist service over the entire 29.71 miles of track. In addition, Protect disputes NL’s legal authority to allow Saratoga to acquire the track under NL’s rail easement. Finally, Protect

¹ Although Protect describes its letter as a “protest,” it will be considered a petition to reject the notice of exemption

contends that the proposed transaction requires environmental review under the Board's regulations implementing the National Environmental Policy Act (NEPA). 42 U.S.C. § 4332.

On November 22, 2011, Saratoga filed a reply to Protect's petition to reject the notice of exemption. Saratoga argues that Protect has not alleged any basis for the Board to reject the notice. Saratoga submits additional information regarding the legal status of the track and the current operational status of NL's mine. Saratoga argues that there are no restrictions on the easement for rail service over the right-of-way. Saratoga also states that the State of New York's Department of Transportation, in a letter dated September 19, 2011, has waived its statutory right to exercise its reversionary interest and reacquire the underlying property. Furthermore, Saratoga states that it has conducted initial discussions for transporting via rail both the industrial garnets from nearby Barton Mines and the magnetite ore reserves located and processed at NL's mine. Both Barton and NL currently ship via truck. Saratoga also states that the acquisition does not trigger environmental review under NEPA. Finally, Saratoga's reply submission contains conflicting statements regarding its intentions for passenger excursion operations on the line.²

Typically, the Board does not consider the feasibility of proposed rail operations in giving effect to a notice invoking the class exemption. The Board's authority is permissive, so the possibility always exists that the party filing the notice may be unable to initiate the proposed operations. But where an allegation is made, supported by evidence, that the exemption sought is for purposes other than for providing common carrier rail service, the Board will not allow the exemption to go forward without considering that evidence and argument. Although Saratoga states that it has engaged in discussions with 2 shippers about potential freight rail service, both customers currently ship their products via truck. Furthermore, although Saratoga's notice of exemption made no mention of potential passenger service, its reply contains statements that such operations will commence in the very near future.

In general, the notice of exemption process is an expedited means of obtaining Board authority in certain classes of transactions, defined in the Board's regulations, which ordinarily do not require extensive regulatory scrutiny. Thus, notices of exemption are intended to be used for routine and non-controversial cases. In cases where issues arise that cannot be resolved within the limited procedures afforded by the class exemption, the Board may reject a notice.

² Compare Saratoga Reply at 10 ("While Saratoga might elect to operate excursion service at some point, it has no immediate plans to do so."), with V.S. of Stephen Gregory at ¶4 ("[O]ur vision to develop the . . . rail asset was twofold: initial deployment of resources to immediately provide passenger-train service to be followed by freight traffic development."), and Letter of L. Andrew Fleck at ¶5 ("NL has agreed to provide Saratoga with reasonable and appropriate site access at the northern terminus of the rail line for passenger accommodation."). Not all passenger service is within the Board's jurisdiction.

Saratoga's notice of exemption will be rejected because the record indicates that this matter is not routine and non-controversial and because the short deadlines provided in the class exemption regulations do not provide sufficient time to enable the Board to address the issues raised here before the exemption takes effect. To allow a proper examination of all the concerns discussed above, Saratoga may file a petition for an individual exemption or a full application.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Saratoga's notice of exemption is rejected.
2. The decision is effective on the date of service.

By the Board. Julia M. Farr, Acting Director, Office of Proceedings.

EXHIBIT D

VERIFIED STATEMENT

My name is Stephen Gregory, and I am Executive Vice President – Marketing of Iowa Pacific Holdings LLC and its six U. S. railroads, including Saratoga & North Creek Railway LLC. My responsibility is the development of rail freight traffic. I have been employed in the railroad industry for 37 years, having previously served in several positions at Chicago & North Western Transportation Co., then Vice President – Marketing for OmniTRAX Inc. I have been with Iowa Pacific since 2001.

Iowa Pacific's mission since its founding in 2001 has been to identify shortline railroads that offer significant business development potential, either freight or passenger, depending on the properties and their markets. New rail freight traffic development can be an extremely lengthy process, so as a privately-held company we are prepared to take a very long-term view.

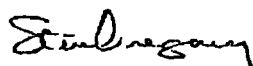
For example, our Texas – New Mexico Railroad was acquired in 2002 with marginal freight traffic and major capital requirements. After investing in upgrading the track and facilities, the railroad is poised to experience enormous growth as it participates in the expansion of domestic oil and gas production, almost ten years later.

As we made clear in our presentations to Warren County and the Town of Corinth, which were amply reported in the local media, our vision to develop the County and Town's rail asset was twofold: initial deployment of resources to immediately provide passenger-train service to be followed by freight traffic development. Since the last freight was handled on this line in 1989, we expect that new rail freight will take time to produce and we have made a long-term commitment to do so. This vision will benefit the region as trucks are removed from highways, the environmental benefits of rail transportation are realized, and the viability of the railroad is secured.

The acquisition of the Tahawus Line is completely consistent with this vision. Our initial discussions with NL Industries and Barton Mines indicate there is substantial opportunity for new rail markets for mine tailings as construction aggregates and potentially industrial minerals as well.

VERIFICATION

I, Stephen Gregory, declare under penalty of perjury that the preceding is true and correct. Further, I certify that I am qualified and authorized to file this statement on behalf of the Saratoga & North Creek Railway, LLC. Executed on this 21st day of November 2011.



Stephen Gregory

EXHIBIT E



REAL ESTATE DEPARTMENT
TELEPHONE: 972.450.4288

NL INDUSTRIES, INC.
THREE LINCOLN CENTRE
5430 LBJ FREEWAY
SUITE 1700
DALLAS, TEXAS 75240-2697

TELEPHONE FACSIMILE: 972.450-4281

November 21, 2011

Cynthia A. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street SW
Washington, DC 20423-0001

Re: FD 35559 Saratoga and North Creek Railway LLC
Operation Exemption - File # 231173

Dear Ms. Brown:

I submit this letter in support of the verified notice of exemption ("NOE") filed by Saratoga and North Creek Railway, LLC ("Saratoga") and in response to several inaccuracies in the letter of objection filed by Protect the Adirondacks ("Protect"). I am Real Estate Manager for NL Industries, Inc. ("NL"). I have held this position of the past 11 years and as such am fully knowledgeable of the facts and circumstances surrounding the subject rail line and mine property discussed in the Protect comments.

NL is the owner of significant real estate holdings including, among others, the mine property located at Tahawus, New York in the Town of Newcomb at the northern terminus of the rail line that runs from North Creek to Tahawus. Kronos (US), Inc., as successor in interest to Kronos, Inc. and NL Chemicals, Inc. ("Kronos") is a subsidiary of NL and the former owner of that series of easements and railroad rights of way and rails extending from the terminal connection of the former Delaware and Hudson Railroad at North Creek, New York to the mines of NL at Sanford Lake, Tahawus, New York, traversing a distance more or less of 29.71 miles (the "Tahawus line"). Kronos acquired the Tahawus line from the United States of America by deed dated September 18, 1989. Kronos, in turn, conveyed title to the Tahawus line to Saratoga on or about November 4, 2011.

I reviewed the NOE filed by Saratoga. With respect to any representations Saratoga made regarding Kronos or NL, I see nothing that is either false or misleading. In comparison, however, I identified numerous inaccurate statements in the comment letter filed by Protect. For example, in its comments objecting to the NOE, Protect states that the rail line was limited strictly to hauling ilmenite ore from Tahawus. However, the Final Judgment of Condemnation issued by the United States District Court in or about December 1962, expressly states that the easement over State lands was for the "location, relocation, construction, maintenance, operation and removal of railroad facilities". A copy of that judgment is attached hereto.

Page Two
Cynthia A. Brown

In addition, Protect expresses its opinion that NL has abandoned all operations at the mine property and will "never again haul ore on the rail spur again." However, contrary to this opinion, NL maintains a significant reserve of rock and magnetite on the site which is currently processed on-site and shipped from the site by truck pursuant to private contract. There are also a number of pieces of heavy equipment on site to handle the staging, crushing and screening of such materials prior to off-site transport. Our annual rock/magnetite sales have averaged in excess of \$100,000 over the last 4 years and there remains several more years' worth of reserves. NL is in active negotiations with Saratoga regarding the sale and transport of this material over the rail line.

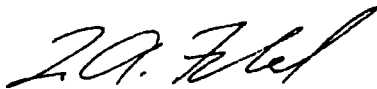
Protect also inaccurately opines that the mine property is "highly contaminated" and disingenuously suggests that it poses a public safety or health risk. This allegation is false. NL has spent over \$4 million reclaiming its mine property and, with the exception of continued site monitoring, NL has completed its remedial obligations to the State. Moreover, should it be required in the future, NL has agreed to provide Saratoga with reasonable and appropriate site access at the northern terminus of the rail line for passenger accommodation.

Finally, Protect mischaracterizes the purpose and intent of the NYS Department of Transportation ("NYSDOT") characterization of the rail line as being abandoned. It is my understanding that the NYS Transportation Law provides the State with a preferential right of acquisition before any abandoned or under-utilized rail property can be disposed of for other than transportation purposes. The purpose of this right appears to be the preservation of rail property and infrastructure for transportation purposes. Indeed, prior to Kronos' transfer of the rail line to Saratoga, we again notified NYSDOT of this transaction and the State issued an exemption of its preferential right of acquisition because operation of the rail line would be resumed. A copy of the NYSDOT exemption is attached here.

I hope the foregoing provides some clarification to the statements made in the Protect letter. Please feel free to contact me should you have any further questions.

Sincerely,

NL INDUSTRIES, INC.

A handwritten signature in black ink, appearing to read "L. Andrew Fleck", written in a cursive style.

L. Andrew Fleck
Real Estate Manager